Supreme Court, U.S.
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No. 00-93

IN THE

Supreme Court of the United States

INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNION NO. 12,

Petitioner,

v.

CALMAT CO and INDUSTRIAL ASPHALT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the Ninth Circuit Court of Appeals' unpublished decision below creates a split with the Third Circuit Court of Appeals on the causation requirement for awarding damages to an employer as a result of a labor strike in violation of Section 8(b)(4)(i)(A) of the National Labor Relations Act.

2. Whether this Court should reverse the Ninth Circuit Court of Appeals' decision affirming the District Court's findings that Petitioner's unlawful conduct caused Respondents to incur additional security costs.

3. Whether this Court should reverse the Ninth Circuit Court of Appeals' decision affirming the District Court's findings that Petitioner unlawfully picketed three of Respondents' customers.

STATEMENT PURSUANT TO RULE 29.6

Respondent, CalMat Co, is a wholly-owned subsidiary of Vulcan Materials Company.

At the time the Complaint in this action was filed and until December 1995, Respondent Industrial Asphalt was a partnership of two wholly-owned corporate subsidiaries of CalMate Co "Industrial Asphalt" is now a trade name of CalMate Co.

TABLE OF CONTENTS

	Page
Counterstatement Of The Questions Presented	i
Statement Pursuant To Rule 29.6	ii
Table Of Contents	iii
Table Of Cited Authorities	vii
Opinion Below	1
Statement Of Jurisdiction	1
Statutes Involved	1
Statement Of The Case	3
I. Summary Of The Case.	3
A. Respondents CalMat and Industrial Asphalt.	3
B. The Parties' Bargaining Relationship. ..	4
C. All Three Bargaining Units Represented by Petitioner Struck on July 25, 1995. ..	5
D. Petitioner's Failure to Shut Respondents' Operations Down.	5
E. Respondents Hired Security Experienced in Handling Labor Strikes.	6

Contents

Page

II. The Judgment Of The District Court And The Decision Of The Ninth Circuit Court Of Appeals 6

Summary Of The Argument 7

Reasons For Denying The Writ 9

I. Question No. 1: Whether The Ninth Circuit's Unpublished Decision Below Creates A Split With The Third Circuit On The Causation Requirement For Awarding Damages To An Employer As A Result Of A Labor Strike In Violation Of Section 8(b)(4)(i)(A) Of The National Labor Relations Act. 9

A. The Ninth Circuit's Decision Below Does Not Create a Split Among the Circuits. 9

1. The Ninth and Third Circuit Courts of Appeals actually are in accord. .. 9

2. The Ninth Circuit's Decision below was not reported and may not be cited. 10

B. Additional Reasons for Denying Review. 11

Contents

Page

1. This Court already has addressed the proper causation requirement. . . 11

2. Review by this Court should await further published decisions of the Courts of Appeals. 13

3. Secondary boycott lawsuits such as this case are rare and review by this Court will prevent this Court from addressing more important issues. 13

4. Reweighing the evidence and repeating the review process of the Ninth Circuit Court of Appeals is not a prudent use of this Court's time. 14

5. Review by this Court will not benefit Petitioner because the Judgment is based on dual theories of liability. 15

III. Question No. 2: Whether This Court Should Review The Ninth Circuit Court Of Appeals' Decision Affirming The District Court's Findings That Petitioner's Unlawful Conduct Caused Petitioners To Incur Additional Security Costs. 16

Contents

Page

IV. Question No. 3: Whether This Court Should Review The Ninth Circuit Court Of Appeals' Decision Affirming The District Court's Findings That Petitioner Unlawfully Picketed Three Of Respondents' Customers. 17

Conclusion 18

TABLE OF CITED AUTHORITIES

Page

Cases:

Blair v. United Mine Workers, 211 F. Supp. 786 (E.D. Ky. 1962) 16

Burrell v. Board of Trustees, 125 F.3d 1390 (11th Cir. 1997) 15

Connell Constr. Co. v. Plumbers & Steamfitters Local 100, 421 U.S. 616, 95 S. Ct. 1830 (1975) 11

Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 82 S. Ct. 1404 (1962) 12

Cranshaw Constr. of New England, L.P. v. International Ass'n of Bridge, Structural & Ornamental Ironworkers, Local No. 7, 891 F. Supp. 666 (D. Mass. 1995) 16

Feather v. United Mine Workers, 711 F.2d 530 (3rd Cir. 1983) 7, 9, 10, 13, 15

Feather v. United Mine Workers of America, 903 F.2d 961 (3rd Cir. 1990) 9

Flame Coal Co. v. United Mine Workers, 303 F.2d 39 (6th Cir. 1962) 16

Cited Authorities

Page

Frito-Lay, Inc. v. Local 137, Int'l Bhd. of Teamsters, 623 F.2d 1354 (9th Cir. 1980), *cert. denied*, 449 U.S. 1013, 101 S. Ct. 571 (1980 & 1981) ..... *passim*

Kayser-Roth Corp. v. Textile Workers Union, 347 F. Supp. 801 (E.D. Tenn. 1972), *aff'd*, 479 F.2d 524 (6th Cir. 1973) 16

Matson Plastering Co. v. Plasterers & Shophands Local No. 66, 852 F.2d 1200 (9th Cir. 1988) ... 16

Mead v. Retail Clerks Int'l Ass'n, 523 F.2d 1371 (9th Cir. 1975) ..... *passim*

Metropolitan Paving Co. v. International Union of Operating Eng'rs, 439 F.2d 300 (10th Cir. 1971) 16

Mobil Mechanical Contractors Ass'n, Inc. v. Carlough, 664 F.2d 481 (5th Cir. 1981), *cert. denied*, 456 U.S. 975 (1982) 13

National Labor Relations Bd. v. Denver Bldg. & Constr. Trades Council, 341 U.S. 675, 71 S. Ct. 943 (1951) 2

Pepsi-Cola Co. v. Rhode Island Carpenters Dist. Council, 962 F. Supp. 266 (D. R.I. 1977) 16

Teamsters Union v. Morton, 377 U.S. 252, 84 S. Ct. 1253 (1964) 11

Cited Authorities

	Page
Tresca Bros. Sand & Gravel, Inc. v. Truck Drivers Union, Local 170, 19 F.2d 63 (1st Cir. 1994)	13
Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 89 S. Ct. 1562 (1969)	7, 12
Statutes:	
29 U.S.C. § 158(b)(4)	1, 2, 13
29 U.S.C. § 158(b)(4)(i)	2
29 U.S.C. § 158(b)(4)(i)(A)	i, 13, 14
29 U.S.C. § 158(b)(4)(ii)	2
29 U.S.C. § 158(b)(4)(A)	3, 13, 15
29 U.S.C. § 158(b)(4)(B)	3, 7, 15
29 U.S.C. § 187	1
29 U.S.C. § 187(b)	7, 11, 13
Rules:	
Fed. R. Civ. P. 52(a)	15
Supreme Court Rule 12	8, 14, 17

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals is unreported but may be found at 2000 WL 219746. A copy is attached to the Petition at A46 through A49.

The District Court's Findings of Fact and Conclusions of Law are not reported. A copy is attached to the Petition at A1 through A43.

STATEMENT OF JURISDICTION

Respondents agree with the statement of jurisdiction of this Court, the Ninth Circuit Court of Appeals and the District Court as set forth by Petitioner.

STATUTES INVOLVED

Respondents filed this action pursuant to Section 303 of the Labor Management Relations Act, 29 U.S.C. § 187, to recover damages for unfair labor practices as defined in Section 8(b)(4) of the National Labor Relations Act, 29 U.S.C. § 158(b)(4).

Section 303, 29 U.S.C. § 187, provides:

> (a) It shall be unlawful, for purposes of this section only, in an industry or activity affecting commerce, for any labor organization to engage in any activity or conduct defined as an unfair labor practice in section 8(b)(4) [of this title].

> (b) Whoever shall be injured in his business or property by reason of any violation of subsection (a) of this section may sue therefor in any district court . . . and shall recover the damages by him sustained and the cost of suit.

Section 8(b)(4), 29 U.S.C. § 158(b)(4), prohibits what is known as the "secondary boycott." Its purpose is to avoid enmeshing neutral employers in other employers' labor disputes. *See National Labor Relations Bd. v. Denver Bldg. & Constr. Trades Council*, 341 U.S. 675, 692, 71 S. Ct. 943, 953 (1951) (Section 8(b)(4) is "shielding unoffending employers and others from pressures in controversies not their own.").

To achieve this objective, Section 8(b)(4) prohibits unions from engaging in the following conduct for certain proscribed purposes:

> (i) To engage in, or to induce or encourage any individual . . . to engage in, a strike or refusal in the course of his employment to use, . . . transport, or otherwise handle or work on any . . . materials. . . .

29 U.S.C. § 158(b)(4)(i).

> (ii) [T]o threaten, coerce, or restrain any person engaged in commerce. . . .

29 U.S.C. § 158(b)(4)(ii).

The two proscribed purposes relevant to this action are:

> (A) forcing or requiring any employer . . . to join any . . . employer association. . . .

29 U.S.C. § 158(b)(4)(A).[1]

> (B) forcing or requiring any person to cease using, . . . handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer. . . .

29 U.S.C. § 158(b)(4)(B).

STATEMENT OF THE CASE

I. SUMMARY OF THE CASE.

A. Respondents CalMat and Industrial Asphalt.

Respondents CalMat and Industrial Asphalt are engaged in the business of producing, manufacturing and selling construction materials, including sand, crushed rock, readymix concrete, asphalt and related products. (App. 1). CalMat's asphalt operations are operated under the trade name "Industrial Asphalt."[2]

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1. Although set forth in what is termed the "secondary boycott" provisions of the Act, Section 8(b)(4)(A) proscribes any conduct by Petitioner directed at *Respondents* themselves for this object even though Respondents were the "primary" employer.

2. Respondents CalMat Co. and Industrial Asphalt hereafter will be referred to collectively as "Respondents," except where necessary to distinguish between them.

B. The Parties' Bargaining Relationship.

The parties have had a collective bargaining relationship since 1984. During the time of Petitioner's unlawful conduct for which the District Court held Petitioner liable to Respondents, Petitioner represented three bargaining units of Respondents' employees: (1) Respondents' rock, sand, and gravel employees; (2) Respondents' asphalt plant operators; and (3) Respondents' asphalt laydown crews.

This last unit of laydown crews was represented by Local 12 through a multi-employer bargaining association, the Associated General Contractors ("AGC'). However, Respondent CalMat had previously withdrawn from the AGC in an unsuccessful attempt to bargain independently with Local 12. (App. 3-5). After this withdrawal, Petitioner's Business Manager (CEO equivalent) expressed his objection to Respondent CalMat's withdrawal from the AGC to Respondent CalMat's Vice President of Human Resources during the course of negotiations. (App. 30).

At about the same time, Respondent Industrial Asphalt had withdrawn its bargaining authority from the Permanent Asphalt Plant Employers Association ("PAPEA"). In response to Industrial Asphalt's withdrawal, all other member employers withdrew from the PAPEA. (App. 30) Petitioner's Business Manager again expressed his displeasure, this time blaming Respondent Industrial Asphalt for the dissolution of the PAPEA. (SE 10-11, 15-16).[3]

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3. Citations in the form "SE: [page no]" are to the Supplemental Excerpts of Record filed with the Ninth Circuit Court of Appeals.

C. All Three Bargaining Units Represented by Petitioner Struck on July 25, 1995.

On July 25, 1995, following exhaustive negotiations, Petitioner struck and picketed Respondents at approximately 34 locations throughout Southern California. (SE:479; App.5) All three bargaining units represented by Petitioner went on strike at the same time. This three unit strike was intended to increase Petitioner's leverage against Respondents as, had any one unit reached an agreement or not struck, the strike on behalf of the other two bargaining units would have been less effective.

D. Petitioner's Failure to Shut Respondents' Operations Down.

The strike was intended to cause Respondents to suffer substantial economic hardship and to force Respondents to acquiesce in Petitioner's demands. Petitioner's objective, however, was frustrated by Respondents' immediate ability to continue operating during the strike by placing management personnel in the plants, hiring replacement workers and using Petitioner's members who elected to cross the picket lines to work during the strike. (SE:13). Thus, Respondents' plants remained in operation, with some plants experiencing only a few minor delays during the first few days of the strike, and Respondents continued to service its customers' needs. (SE:419-20).

The strike's failure left Petitioner without lawful bargaining leverage. Therefore, Petitioner resorted to unlawful bargaining leverage — the unlawful secondary boycott — in a further attempt to obtain the desired bargaining concessions.

E. Respondents Hired Security Experienced in Handling Labor Strikes.

Based on the stalemated negotiations, in early 1995, Respondents began preparation for a strike by Petitioner. Respondents retained a private security firm, Personnel Support Systems, Inc. ("PSS"), known nationally for handling labor strikes. PSS was retained to insure that Respondents and their customers were able to continue operations free of interference by Petitioner. (SE:217-18,223-25,251-53,267-69). Respondents were especially concerned about secondary boycotts of their customers because they expected that if they could continue to operate during the strike, Petitioner would resort to such unlawful tactics. (SE:217-18,223-25,251, 267-69).

This concern was not unfounded. Petitioner has a history of violence, intimidation, and secondary boycotts during labor disputes. So often has Petitioner violated the law that it has been subject to an injunction against secondary boycott activity continuously since at least 1983. During its strike of Respondents, Petitioner was subject to an injunction issued by the Ninth Circuit Court of Appeals. (SE:327,729-40).

II. THE JUDGMENT OF THE DISTRICT COURT AND THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS

At trial, Respondents proved lost profits in the amount of $1,168,247. They also proved that $1,417,054 of their more than $3,000,000 of security expenses were incurred as a result of Petitioner's unlawful actions. Total damages awarded were $2,585,301.

The District Court adjudged, and the Ninth Circuit Court of Appeals affirmed, that all damages were fully recoverable as a result of Petitioner's violations of both Section 8(b)(4)(A) and 8(b)(4)(B).

SUMMARY OF THE ARGUMENT

The Petition for Writ of Certiorari should be denied as to each of the three Questions presented.

First and foremost, there simply is no split of authority between the Ninth and Third Circuit Courts of Appeals on the proper causation requirement for recovering damages as a result of an unlawful strike in violation of Section 8(b)(4)(A). Indeed, when the Third Circuit first addressed this issue subsequent to the two relevant Ninth Circuit decisions, it expressly adopted the Ninth Circuit's interpretation:

> We believe that the Ninth Circuit has correctly interpreted the causation requirement in Section 303(b).

Feather v. United Mine Workers, 711 F.2d 530 (3rd Cir. 1983).

In addition, this causation requirement already has been addressed by this Court. The "by reason of" language in Section 303(b) was borrowed from the related Clayton Antitrust Act provision, for which this Court has articulated a causation requirement of "materially contributed." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9, 89 S. Ct. 1562 (1969).

Therefore, the District Court's and Ninth Circuit's application of a "substantial factor" or "materially contributed" causation test was not only consistent with Third Circuit authority, but also consistent with long-established authority of this Court.

Additionally, to the extent Petitioner seeks review of the District Court's factual findings and conclusions of law relevant to the proper causation test, that is not a prudent investment of this Court's time, especially where Petitioner already has twice obtained judicial review: Once when the District Court — and not a jury — sat as trier of fact; Twice when the Court of Appeals reviewed its findings of fact and conclusions of law. Indeed, such a reason for requesting review by this Court is expressly discouraged by Supreme Court Rule 12.[4]

Finally, denying review is further supported by a host of other reasons, including that the issues of law raised by the Questions surface rarely and have required minimal attention by the Circuit Courts of Appeal and the Judgment in this case is supported by alternative theories of liability and, therefore, even partial review will not affect the outcome.

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4. Because Questions Nos. 2 and 3 presented by the Petition seek only review of the findings of fact and conclusions of law, review by this Court is unwarranted for this same reason.

REASONS FOR DENYING THE WRIT

I. QUESTION NO. 1: WHETHER THE NINTH CIRCUIT'S UNPUBLISHED DECISION BELOW CREATES A SPLIT WITH THE THIRD CIRCUIT ON THE CAUSATION REQUIREMENT FOR AWARDING DAMAGES TO AN EMPLOYER AS A RESULT OF A LABOR STRIKE IN VIOLATION OF SECTION 8(b)(4)(i)(A) OF THE NATIONAL LABOR RELATIONS ACT.

A. The Ninth Circuit's Decision Below Does Not Create a Split Among the Circuits.

1. The Ninth and Third Circuit Courts of Appeals actually are in accord.

The Ninth Circuit Court of Appeals has twice addressed the causation requirement to support an award of damages for an unlawful secondary boycott. *See Mead v. Retail Clerks Int'l Ass'n*, 523 F.2d 1371 (9th Cir. 1975), *Frito-Lay, Inc. v. Local 137, Int'l Bhd. of Teamsters*, 623 F.2d 1354 (9th Cir. 1980), *cert. denied*, 449 U.S. 1013, 1112, 101 S. Ct. 571, 922 (1980 & 1981).

Thereafter, when the Third Circuit Court of Appeals was faced with the same issue in *Feather v. United Mine Workers*, 711 F.2d 530 (3rd Cir. 1983) (hereafter "*Feather I*"),[5] it not

5. Following remand to the District Court, the case was again appealed to the Third Circuit Court of Appeals. The subsequent decision of the Third Circuit, *Feather v. United Mine Workers of America*, 903 F.2d 961 (3rd Cir. 1990) (hereafter "*Feather II*"), affirmed the District Court's judgment that the union was liable (Cont'd)

only cited both *Mead* and *Frito-Lay* with approval, but it expressly adopted the Ninth Circuit's causation standard:

> In *Mead v. Retail Clerks, supra*, the Ninth Circuit reviewed a factual situation very similar to that in the present case and discussed at some length the proper method of applying the causation requirement of section 303(b) to such a setting . . . *We believe that the Ninth Circuit has correctly interpreted the causation requirement in section 303(b)*. To receive a damage award under that provision, the plaintiffs in this case must demonstrate not that the unlawful [objective] . . .was a *substantial factor* in or *materially contributed* to the Union's decision to call and maintain that strike.

Feather I, 711 F.2d at 537-38. (Emphasis added.)

Thus, there simply is no split between the Ninth and Third Circuit Courts of Appeals on the causation requirement to recover damages in a secondary boycott action.

2. The Ninth Circuit's Decision below was not reported and may not be cited.

The Decision of the Ninth Circuit Court of Appeals does not create a split of authority with the Third Circuit Court of Appeals for the simple reason that it was not reported and may not be cited. The very first page of the Decision reads:

(Cont'd)

for damages because the unlawful objective was a substantial factor in, or materially contributed to, the union's decision to strike. The Third Circuit also again cited both Ninth Circuit decisions, *Mead* and *Frito-Lay*, with approval.

> This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

In any event, the Ninth Circuit Court of Appeals affirmed the Judgment of the District Court based on both *Mead* and *Frito Lay*. Therefore, it did not depart from its own authority which is wholly consistent with Third Circuit authority.

B. Additional Reasons for Denying Review.

1. This Court already has addressed the proper causation requirement.

Section 303(b), 29 U.S.C. § 187(b), reads in relevant part:

> Whoever shall be injured in his business or property *by reason or [of]* any [secondary boycott] may sue therefor in any district court . . .

(Emphasis added.)

As noted by the Ninth Circuit Court of Appeals, "Section 303 was enacted as an alternative to subjecting unions to antitrust liability for secondary activity and the 'by reason of' language of Section 303 was drawn directly from the Clayton [Antitrust] Act." *Mead*, 523 F.2d at 1376, *citing Connell Constr. Co. v. Plumbers & Steamfitters Local 100*, 421 U.S. 616, 634, n.15, 95 S. Ct. 1830, 1840-41, n.15 (1975), and *Teamsters Union v. Morton*, 377 U.S. 252, 260 n.16, 84 S. Ct. 1253 (1964).

Accordingly, when the Ninth Circuit Court of Appeals formulated its "substantial factor" or "materially contribute" causation requirement, it did so based on the decisions of this Court in the related antitrust context. The Ninth Circuit continued its analysis:

> [Plaintiffs] must also show they were "injured in [their] business or property by reason of" the violation. . . . The solution . . . is found in a body of authority developed primarily under the antitrust laws. . . . In the antitrust context, the "by reason of" language is read as incorporating common law principles of causation.

Mead, 523 F.2d at 1376 (citations omitted).

Citing this Court's decisions in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9, 89 S. Ct. 1562 (1969), and *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 702, 82 S. Ct. 1404 (1962), the Ninth Circuit concluded:

> Reading section 303 in this manner, injury occurred "by reason of" particular unlawful conduct if such conduct 'materially contributed' to the injury. . . .

Mead, 523 F.2d at 1376 (additional citations omitted).

Thus, this Court has already addressed the causation requirement for which Petitioner seeks review. Petitioner has failed to offer any reason why two identically worded and related statutes should be interpreted differently. The Petition should therefore be denied, just as the petition in *Frito-Lay* was denied.

2. Review by this Court should await further published decisions of the Courts of Appeals.

According to Petitioner, only the Ninth and Third Circuit Courts of Appeals have addressed the proper causation requirement for awarding damages under Section 303(b), 29 U.S.C. § 187(b). Because the Ninth and Third Circuit Courts of Appeals are in accord, it would be premature for this Court to grant review. Rather it should await further decisions by the Courts of Appeal to determine whether a split of authority will materialize and for further ripening of the issue for review by this Court.[6]

3. Secondary boycott lawsuits such as this case are rare and review by this Court will prevent this Court from addressing more important issues.

Section 8(b)(4), was enacted in 1947 — more than 50 years ago. Yet, as previously indicated, only four Circuit Courts of Appeals have published decisions on the issue for which Petitioner seeks review, *i.e.*, the proper causation requirement for awarding an employer damages for a union's strike in violation of Section 8(b)(4)(A).

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6. Although not cited to or mentioned by Petitioner, Respondents located two decisions of other Circuit Courts of Appeals in accord with both the Ninth and Third Circuit Courts of Appeals where a union violated Section 8(b)(4)(i)(A). *See Tresca Bros. Sand & Gravel, Inc. v. Truck Drivers Union, Local 170*, 19 F.2d 63 (1st Cir. 1994) (citing *Mead*, *Frito-Lay* and *Feather I*); *Mobil Mechanical Contractors Ass'n, Inc. v. Carlough*, 664 F.2d 481, 486 (5th Cir. 1981), *cert. denied*, 456 U.S. 975 (1982) (affirming the damages award based on *Frito-Lay*). Thus, it is unlikely that a split between the Circuit Courts of Appeals will ever materialize.

Thus, this issue for which Petitioner seeks review is one which rarely has surfaced and has required minimal attention by the Circuit Courts of Appeals. Thus, this Court's time is better spent addressing issues of law which are more prevalent and for which the guidance of this Court would better benefit the lower courts.

4. Reweighing the evidence and repeating the review process of the Ninth Circuit Court of Appeals is not a prudent use of this Court's time.

Supreme Court Rule 12 sets forth the "compelling reasons" for which this Court will grant review. Expressly excluded from those reasons is alleged erroneous factual findings and conclusions of law:

> A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Supreme Court Rule 12.

Because the Ninth and Third Circuits are in accord, the real purpose of the Petition is to ask this Court to grant review because Petitioner believes the Ninth Circuit erred in affirming that "Petitioner's strikes were motivated, *at least in significant part*, to cause CalMat to rejoin the Associated General Contractors ("AGC")," which is a violation of Section 8(b)(4)(i)(A).[7]

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7. Petitioner's suggestion that the Ninth Circuit's "at least in significant part" language is "far weaker" than the "substantial factor" or "materially contribute" standard set forth in its *Mead* and *Frito-Lay* (Cont'd)

However, where as here, Petitioner has enjoyed the benefit of (i) the District Court — rather than a jury — sitting as the trier of fact, and (ii) extensive review by the Ninth Circuit Court of Appeals, it is unnecessary for this Court to assume the role of a Circuit Court of Appeal and review the evidence to determine whether the District Court's Findings of Fact were in "clear error." Fed. R. Civ. P. 52(a).

5. Review by this Court will not benefit Petitioner because the Judgment is based on dual theories of liability.

As explained above, the damages awarded for Petitioner's violation of Section 8(b)(4)(A) also were awarded for Petitioner's violation of Section 8(b)(4)(B). Therefore, even if Petitioner were to prevail on the Section 8(b)(4)(A) issue, the damages award would survive based on Petitioner's Section 8(b)(4)(B) violations. Thus, unless this Court grants review on Questions Nos. 2 and 3 — which seek only review of factual findings and conclusions of law and, therefore, review is highly unlikely — review of this first Question will not affect the outcome of this case.[8]

(Cont'd)
decisions, as well as the Third Circuit's *Feather I* decision, is without merit. First, those phrases are all synonymous. Second, the fact that both the District Court and the Ninth Circuit cited *Mead* and *Frito Lay* confirms that both Courts applied the proper standard. *See, e.g., Burrell v. Board of Trustees*, 125 F.3d 1390, 1395 (11th Cir. 1997) ("[A] district court, writing after a bench trial, is not required to use 'magic words' . . . [I]n this case it is highly unlikely that the district court — which cited [the law] — would misapprehend [the law].").

8. Likewise, if this Court does not grant review of Question No. 1, there is no reason to grant review of Questions Nos. 2 or 3 because Question No. 1 fully supports the entire damages award.

III. QUESTION NO. 2: WHETHER THIS COURT SHOULD REVIEW THE NINTH CIRCUIT COURT OF APPEALS' DECISION AFFIRMING THE DISTRICT COURT'S FINDINGS THAT PETITIONER'S UNLAWFUL CONDUCT CAUSED PETITIONERS TO INCUR ADDITIONAL SECURITY COSTS.

Every Court to address the issue has concluded that security costs incurred as a result of a union's unlawful secondary boycott are a recoverable item of damages. *Frito-Lay*, 623 F.2d at 1365, n.11; *Matson Plastering Co. v. Plasterers & Shophands Local No. 66*, 852 F.2d 1200, 1202 (9th Cir. 1988); *Metropolitan Paving Co. v. International Union of Operating Eng'rs*, 439 F.2d 300 (10th Cir. 1971); *Flame Coal Co. v. United Mine Workers*, 303 F.2d 39 (6th Cir. 1962); *Pepsi-Cola Co. v. Rhode Island Carpenters Dist. Council*, 962 F. Supp. 266 (D. R.I. 1977); *Cranshaw Constr. of New England, L.P. v. International Ass'n of Bridge, Structural & Ornamental Ironworkers, Local No. 7*, 891 F. Supp. 666 (D. Mass. 1995); *Blair v. United Mine Workers*, 211 F. Supp. 786 (E.D. Ky. 1962); *Kayser-Roth Corp. v. Textile Workers Union*, 347 F. Supp. 801 (E.D. Tenn. 1972), *aff'd*, 479 F.2d 524 (6th Cir. 1973).

That being beyond dispute and not a likely avenue for obtaining review by this Court, Petitioner seeks review on the ground that the evidence does not support either the District Court's or Ninth Circuit's conclusion that Petitioner's unlawful secondary boycott activity was a "substantial factor" or "materially contributed" to its incremental security costs.

However, as explained above, reviewing factual findings and conclusions of law is the role of the Circuit Courts of Appeals. That is what the Ninth Circuit Court of Appeals has already done here following a trial with the District Court — not a jury — sitting as the trier of fact. There simply are no compelling reasons for a departure from this Court's well-established practice of not granting review for such purposes. *See* Supreme Court Rule 12.[9]

IV. QUESTION NO. 3: WHETHER THIS COURT SHOULD REVIEW THE NINTH CIRCUIT COURT OF APPEALS' DECISION AFFIRMING THE DISTRICT COURT'S FINDINGS THAT PETITIONER UNLAWFULLY PICKETED THREE OF RESPONDENTS' CUSTOMERS.

Review of Issue No. 3 also should be denied for all the same reasons. Judicial scrutiny of factual findings and conclusions of law for a third time simply is unnecessary and not a prudent use of this Court's resources.

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9. Many of the additional reasons why review should be denied, and outlined above, with respect to Question No. 1 apply equally to Question Nos. 2 and 3. However, in the interests of economy and efficiency, they will not be repeated here.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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